SUPREME COURT OF THE UNITED STATES

STANDARD OIL COMPANY (New Jersey), *Petitioner,* *against* SOUTHERN PACIFIC COMPANY, AND JAMES C. DAVIS, Director General of Railroads, *Respondents.*	OCTOBER TERM 1923 No. 607

Sirs:

PLEASE TAKE NOTICE that a motion for an order permitting the taking of new evidence in this Court before a Commissioner will be submitted to the Supreme Court of the United States at the opening of Court on the 28th day of April, 1924, or so soon thereafter as counsel can be heard.

Yours, etc.,

WILLIAM H. MCGRANN,
JOHN M. WOOLSEY,
Counsel for Petitioner.

Dated New York, April 14, 1924.

To:

MESSRS. BURLINGHAM, VEEDER, MASTEN & FEAREY,
Proctors for Southern Pacific Co., et al.,
Respondents.

SUPREME COURT OF THE UNITED STATES

STANDARD OIL COMPANY (New Jersey), *Petitioner,* *against* THE SOUTHERN PACIFIC COMPANY, AND JAMES C. DAVIS, Director General of Railroads, *Respondents.*	OCTOBER TERM 1923 No. 607

MOTION FOR AN ORDER PERMITTING THE TAKING OF NEW EVIDENCE IN THIS COURT BEFORE A COMMISSIONER.

AND NOW COMES Standard Oil Company (New Jersey) as owner of the steamship *Cushing* petitioner, and moves that this Court grant to the petitioner, either

1. An order (a) giving leave to the petitioner to take additional evidence in this Court, in pursuance of the request heretofore made in the petition for certiorari, granted herein on the 12th day of November, 1923, and (b) appointing a commissioner with leave to sit in Washington and/or New York to take such evidence orally herein and to report it duly certified to this Court to be printed as a part of the Record herein, or

2. Such other order and relief as the justice of the cause may require.

WILLIAM H. McGRANN,
JOHN M. WOOLSEY,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

STANDARD OIL COMPANY (New Jersey),
Petitioner,

against

THE SOUTHERN PACIFIC COMPANY, AND JAMES C. DAVIS, Director General of Railroads,
Respondents.

Affidavit in Support of Motion for Leave to Take New Evidence in this Court.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

WILLIAM H. MCGRANN, being duly sworn, says:

I. I am of counsel for the petitioner herein.

II. In the petition for certiorari granted herein on the 12th day of November, 1923, the situation by reason of which this motion to take new proofs in this Court is made, was fully set forth in paragraphs 11th, 12th, 13th and 14th of the petition, and in the 3rd paragraph of the statement of reasons why the writ should be allowed.

III. The facts of the case were set forth in the petition as follows:

On December 28, 1917, pursuant to Act of Congress of August 26, 1916, Chap. 418, Par. I, 39 Stat. 645, and

under the Proclamation of the President of December 26, 1917, the steamship *Proteus,* owned by the Southern Pacific Company, was taken into the possession and control of the Director General of Railroads, and was thereafter manned, operated, and navigated at the expense of the Director General of Railroads, under his sole control, including the time of the collision hereinafter mentioned. Vol. I, fols. 102-107. The Director General of Railroads was in legal effect the demise charterer in possession of the *Proteus,* which, unless lost, would have continued under the sole control of the Railroad Administration until March 1, 1920; Transportation Act of 1920, Section 200 (a).

On or about August 19, 1918, while the said steamship *Proteus* was in the possession and control of the Director General of Railroads, and manned by its servants, as aforesaid, a collision occurred between the said steamship *Cushing,* and the *Proteus,* with the result that the steamship *Proteus* and her cargo were totally lost.

After the accident, petitions for limitation of liability were filed on behalf of both vessels. The Director General of Railroads as the demise charterer, and as co-petitioner with the Southern Pacific Company, claimed the benefits of its limitations of liability provided by Sections 4283-4286 of the Revised Statutes being represented on the record by Burlingham, Veeder, Masten, and Fearey; and, Roscoe H. Hupper, Vol. I, fol. 127. Although the Southern Pacific Company was owner of the *Proteus* and a co-petitioner in these proceedings, the

real party in interest was the Railroad Administration, because the Railroad Administration had sole possession and control of the steamship *Proteus* as aforesaid and of the two would have been the only party which could properly have been held liable for any damage caused by her loss.

The merits of the collision case were tried out in the United States District Court for the Southern District of New York, and a decision holding both vessels at fault was rendered, with reference to a commissioner to ascertain the damages. Vol. I, pages 509-522; *The Cushing, The Proteus,* 266, Fed. Rep. 570.

The damages were assessed, after extensive proofs before an experienced Commissioner, who heard all the witnesses. The Commissioner awarded "the sum of $750,000, with interest thereon from August 19, 1918, the date of the loss", as the value of the *Proteus,* after considering all relevant facts bearing on the question of "value". Vol. II, fol. 2544.

The findings of the Commissioner as to "the value" of the *Proteus* were reviewed on exceptions by the District Court, Circuit Judge Mack sitting; and, after a well-considered opinion, the exceptions were overruled and the Commissioner's findings confirmed. Vol. II, pages 854-862; *The Cushing,* 285 Fed. Rep. 617. Circuit Judge Mack expressly confirmed and adopted the rule as applied by the Commissioner that "all the relevant facts should be considered" in arriving at the fair recompense to the owner. Vol. II, fol. 2568.

The causes under the limitation proceedings were consolidated by order of the United States District Court of November 6, 1922, Vol. II, pp. 863-864; and final decree was entered in the United States District Court on November 28, 1922. Vol. II, fol. 2604.

The Standard Oil Company (New Jersey) appealed from the final decree on the merits on December 27, 1922, and the Southern Pacific Company appealed from the decree in so far as the value of the *Proteus* was fixed therein, on January 27, 1923. The Director General of Railroads, the real party in interest, did not take any appeal.

The appeals came on to be heard before the Circuit Court of Appeals for the Second Circuit, and that Court, in its opinion handed down July 16, 1923, affirmed the decree of the District Court on the merits, but modified the award for the item of damage representing the value of the steamship *Proteus*, by allowing the sum of $1,225,000 for that item, as against $750,000, which had been awarded by the Commissioner and affirmed by the District Court; that is, the value of the *Proteus* was increased by $475,000, which is an addition of 63⅓% of the original award. The order of that Court to which this petition for certiorari is directed was entered in the Circuit Court of Appeals on July 23, 1923.

The high figure which the Circuit Court of Appeals awarded, viz. $1,225,000, was obtained by taking $1,750,000 as an "estimated cost" of reconstructing the

Proteus anew, and deducting from it the sum of $525,000, as depreciation at two and one-half per cent per year for the eighteen years of age of the vessel. Vol. II, fols. 1607-1610.

IV. After a Statement of the case substantially the same as the preceding, the facts at the basis of the present motion and the intention of the petitioner to make this motion were fully set forth in the application for certiorari, which this Court granted on the 12th day of November, 1923, as follows:

> "ELEVENTH: At the time that the collision occurred, the situation was that the Southern Pacific Company as the innocent owner of the *Proteus*, had a claim against the Director General of Railroads for her value at the time of her loss.
>
> "That loss has been held to be due in part to negligence of the servants of the Director General of Railroads who were operating her at the time of the collision.
>
> "The Southern Pacific Company at the time of the loss had also a claim against the owners of the *Cushing* for the same tort.
>
> "Consequently, the apparent line-up of the parties with the Director General of Railroads and the Southern Pacific Company on the one side and the Standard Oil Company on the other side, does not represent a true analysis of the legal relationships.
>
> "The real legal relationship is that the Southern Pacific Company had a claim against two parties—the Standard Oil Company (New Jersey) and the Railroad Administration, who together,

as the decisions have proved, were joint tort feasors causing the loss of the Southern Pacific Company's steamer *Proteus*.

"Since the expiration of the Term of the Circuit Court of Appeals, it has come to the attention of counsel in this case, through proper and reliable sources, that a final settlement had been arrived at between the Railroad Administration and the Southern Pacific Company by which the liability of the Railroad Administration for the loss of the *Proteus* had been finally satisfied and extinguished by a payment, credit, or adjustment on the basis of the value found by the Commissioner and confirmed by the District Court, namely, $750,000. This settlement was made, the petitioner is informed, between the time of the decision of the District Court and that of the Circuit Court of Appeals.

"The situation, therefore, is singular. Because in addition to the ordinary application for a writ of certiorari which is being put forward and had been planned to be put forward by the petitioner, since the decision of the Circuit Court of Appeals for the reasons hereinafter mentioned, a situation exists, it is believed by counsel for the petitioner, in which settlement by the Director General of Railroads with the Southern Pacific Company has extinguished any claim by the Southern Pacific Company against the Standard Oil Company because it is a settled rule of law in admiralty as well as at common law that a settlement with one joint tort feasor of a claim by the damaged party, precludes the continuance of the claim for the same loss by the damaged party against the other tort feasor.

"In any event, the Southern Pacific Company should not be allowed to claim from the petitioner more than it has agreed with its demise charterer, the Railroad Administration, as the value of the *Proteus* and the basis for its damages for the loss of the *Proteus* through that charterer's fault.

"TWELFTH: The term of the Circuit Court of Appeals for the Second Circuit is held annually. The annual term commences by Rule 3 of that Court on the first day of October in each year. Therefore the term at which the decision in the instant case was made,—the October Term, 1922, of the Circuit Court of Appeals for the Second Circuit,—expired on September 30, 1923.

"Owing to the fact that the term of the Circuit Court of Appeals had expired when the facts above adverted to were learned by the counsel for the petitioner, they are not in a position to make any application for relief of any kind in the Circuit Court of Appeals.

"Naturally the facts just noted are not included in the Record on Appeal here and the only method by which the petitioner will be able to receive any relief is to have this Court grant a writ of certiorari to review the question of damages for the reasons hereinafter stated and then to provide for the taking of such evidence or the discovery of such documents as may be necessary to establish the precise facts regarding the settlement referred to, in order that this Court may be in a position to determine what legal results may have flowed therefrom.

"THIRTEENTH: Certainly it is an extraordinary situation where A having a right against B

for the recovery of the value of a vessel sunk by the joint fault of B and C, should agree with B that the value of the vessel is $750,000, and settle accordingly, and then proceed to claim a value of $1,225,000 against C on a claim which must have been extinguished by the act of settlement between A and B.

"The situation is so singular that it is respectfully urged that this Court find some way in which to deal with the whole situation on certiorari and enable the petitioner to escape from the certainty, which unless certiorari is granted, it now faces of having to account for $475,000 more for the loss of the *Proteus* than was agreed on as her value between her owner and her tort feasor charterer by whose contributing wrong her loss occurred.

"FOURTEENTH: Your petitioner seeks a review of the ruling of the Circuit Court of Appeals as to the award for value of the *Proteus* and thereafter the additional relief above outlined."

The petition for certiorari referring to the facts set forth in the previous quotation also stated as one of the grounds why a review in this Court should be granted that

"3. The peculiar circumstances which have arisen during the pendency of this litigation, as recited in the Eleventh, Twelfth and Thirteenth Articles above, justify a further inquiry into the facts, to determine their legal effect, and their bearing on the measure of damage for which your petitioner may be liable, as to which there is not any relief available except as may be obtained under process of review by this Honorable Court."

V. The prayer of the petition was not merely that the case should be taken up by this court in certiorari but that the

> *"petitioner may have such other and further relief or remedy in the premises as to this Honorable Court may seem meet and just."*

It is to secure this additional relief that this motion is made.

VI. It is not possible to print the record in this case until it is determined what the record will contain with regard to the additional matters mentioned in the preceding quotation because it will be necessary to include those matters in the record on which the case is ultimately argued in this Court in order that the petitioner may be able to present its case fully to the Court.

VII. The reason why the petitioner makes this motion for an order for the appointment of a Commissioner to take evidence *orally* and report it duly certified to this Court, to be used as a part of the record herein, is that the petitioner is not in a position to draw up written interrogatories dealing with the matters mentioned in the above quotation from the certiorari, which it wishes to bring out as an addition to the record herein.

The petitioner does not know, and this deponent as its counsel has been unable to find out with definiteness, just what procedure was followed in connection with the

settlement arrived at between the Director General of Railroads and the Southern Pacific Company in respect of the value of the steamship *Proteus*. Until the evidence has been somewhat developed, counsel for the petitioner cannot even be certain just what witnesses will have to be examined. It will of course be necessary to examine the Director General of Railroads and some of his employees, but who those employees are counsel does not know. It will probably be necessary also to examine officers or employees of the Southern Pacific Company at New York, whose identity is not known to the petitioner or this deponent, and which can be discovered only by means of the procedure that would become available before a Commissioner appointed by this Court.

VIII. It is believed that evidence will have to be taken not only in Washington, but also in New York, and in order that the Commissioner's authority for taking the evidence may be sufficiently elastic it is hoped and requested that the Court, if it grants the order requested, will give the Commissioner appointed specific leave to sit and hear evidence in New York as well as in Washington, and will allow the fees and expenses of the Commissioner in connection with this additional evidence to be taxed as part of the costs of the petitioner in this Court if the petitioner shall be finally successful here.

IX. This deponent is aware that the relief now sought may entail a somewhat unique procedure, but the circumstances which have arisen, and as recited in the

foregoing text, are peculiar, and it is believed that relief cannot be adequately supplied except by means of the procedure as requested herein.

Therefore, this deponent prays that the Court in the exercise of its plenary powers will see fit to grant this motion or, if it will not grant the application for the appointment of a Commissioner to take evidence, at least it will make such an order as will enable the petitioner to secure discovery of the information which it regards as necessary to frame interrogatories to get evidence to enable the Court to deal with the curious and unusual situation which has arisen in this case and was outlined in the petition for certiorari as above set forth in this affidavit.

WILLIAM H. MCGRANN

Sworn to before me this
14th day of April, 1924.

JOHN J. HECKMAN
Notary Public
Bronx County Clerk's No. 147
New York County Clerk's No. 821-A
Kings County Clerk's No. 98
Commission Expires March 30, 1925